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No. 87-2027

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

STATE OF COLORADO ex rel: Colorado Attorney General Duane Woodard,

Petitioner,

V.

WESTERN PAVING CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF OF 42 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION

The States of Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming and the District of Columbia (hereinafter "Amici States") submit this brief in support of the State of Colorado's Petition for a Writ of Certiorari.

INTEREST OF THE AMICI STATES

The Attorneys General of the Amici States are charged by law with the duty to enforce their states' antitrust laws, as well as the federal antitrust laws. In addition, they represent their states and political subdivisions in treble damage actions under the federal antitrust laws and are authorized by law to bring such actions as *parens patriae* on behalf of the natural citizens of their states.[1]

The Amici States, in their capacity as *parens patriae*, play a major role in federal antitrust enforcement. Moreover, the states' own antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[2] Therefore, the Amici States have a

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[1] 15 U.S.C. § 15c (1988).

[2] *E.g.*, Del. Code Ann. tit. 6, § 2113 (1986); Fla. Stat. § 542.32 (1987); Ill. Rev. Stat. ch. 38, para. 60-11 (1987); Me. Rev. Stat. Ann. tit. 10, § 1101 (1980); Neb. Rev. Stat. § 59-829 (Reissue 1984); N.J.

(footnote continued on next page)

substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

The Amici States also enforce state competitive bidding statutes. States spend millions of dollars yearly under such statutes. The holding by the district court in *Western Paving* undermines the very purpose and effectiveness of competitive bidding.

The Amici States support the contention of the State of Colorado that a plaintiff invoking the doctrine of fraudulent concealment meets the first prong of the doctrine by proving the existence of a self-concealing conspiracy. The *Western Paving* court requires a plaintiff relying upon the doctrine of fraudulent concealment to prove that the defendant took affirmative steps, separate and apart from the original wrongdoing, to prevent the plaintiff from discovering a bidrigging cause of action. The "separate and apart" standard applied by the *Western Paving* court encourages fraudulent conduct, undermining the very purpose for which statutes of limitation were created. The State of Colorado's contention, in contrast, promotes sound antitrust policy and effective enforcement of the antitrust laws.

The Amici States' interest is illustrated by a bidrigging case currently pending on appeal entitled *Texas v. Allan Construction Co.* The United States

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(footnote continued from previous page)
Stat. Ann. § 56:9-18 (1988); Okla. Stat. tit. 79, § 1 *et seq.* (1981); S.D. Codified Laws 37-1-22 (1988); Tex. Bus. & Comm. Code § 15.04 (1988) (to the extent consistent with the purpose of maintaining and promoting economic competition in trade and commerce and to provide the benefits of such competition to consumers in Texas); Wash. Rev. Code § 19.86.920 (1985).

District Court for the Western District of Texas granted the *Allan* defendants' motion for summary judgment and dismissed the lawsuit on the basis that limitations had run. The *Allan* court held that the statute of limitations is tolled only by a finding that the bidriggers concealed their wrongful bidrigging scheme by affirmative acts, separate and apart from the fraud[3] itself. A Fifth Circuit panel heard oral argument in the *Allan* case on May 2, 1988; no decision has yet been rendered. Other decisions have been handed down by various state and federal courts construing a state's right to invoke the doctrine of fraudulent concealment.[4] These decisions further illustrate the concrete nature of the Amici States' interest and the doctrine's impact on the states' ability to prosecute bidriggers.

SUMMARY OF ARGUMENT

Western Paving offends public policy and sets dangerous precedent. The standard imposed under *Western Paving* rewards conspirators for the successful concealment of their conspiracies. Furthermore, it puts an antitrust plaintiff to the generally impossible burden of pleading and proving that a bidrigger took an affirmative act to cover up that which by its very nature is already concealed.

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[3]Federal courts have explicitly ruled that concealment of the *per se* antitrust violation of price fixing is equivalent to fraud. *See infra* II. B.

[4]*See e.g., New York v. Hendrickson Brothers. Inc.*, 840 F.2d 1065 (2d Cir. 1988), *petition for cert. filed*, No. 88-21 (U.S. July 2, 1988); *Colorado ex rel. Woodard v. Asphalt Paving Co.*, 1987-1 Trade Cas. (CCH) para. 67,473 at 59,984 (D. Colo. 1987); *Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885 (M.D. Pa. 1985); *Nebraska v. Land Paving Co.*, No. CV-85-L-387 (D. Neb 1985) (unreported).

In *Bailey v. Glover*, this Court established the doctrine of fraudulent concealment, which tolls federal statutes of limitation in cases involving fraudulent conduct. *Bailey* held that a plaintiff could invoke the doctrine when the fraud was concealed or was inherently self-concealing.

The doctrine has been read into every federal statute of limitation, including federal antitrust statutes. In order to invoke the doctrine of fraudulent concealment and toll limitations, an antitrust plaintiff must plead and prove three elements.[5] The dispute in *Western Paving*, an antitrust bidrigging case, concerns the concealment element: whether defendant concealed the conduct which forms the basis of the cause of action.

This Court has not considered the doctrine of fraudulent concealment as it applies to an antitrust bidrigging case. At the appellate and district court levels, case law on the doctrine of fraudulent concealment in antitrust cases is inconsistent, confusing, and vague. Federal courts have applied three conflicting standards to satisfy the concealment element of the fraudulent concealment doctrine: (1) the self-concealing conspiracy standard; (2) the affirmative acts standard; and, (3) the affirmative acts, separate and apart, standard. *Western Paving* adopted the affirmative acts, separate and apart, concealment standard.

Western Paving cannot be reconciled with *Bailey* and other Supreme Court precedent since bidrigging conspiracies are inherently self-concealing and equivalent to fraud; nor can it be reconciled with several appellate and district court decisions including a recent

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[5]The three elements of the fraudulent concealment doctrine are set forth *infra* at II. A.

decision from the United States Court of Appeals for the Second Circuit. Because case law in this area of the law is hopelessly confused and because of the public policy implications of the *Western Paving* decision, this Court should grant the Petition of Certiorari filed herein by the State of Colorado.

ARGUMENT

I. THE HOLDING IN *WESTERN PAVING* DEFIES SOUND LOGIC AND PUBLIC POLICY AND ENCOURAGES FRAUDULENT CONDUCT BY THOSE BIDDING ON GOVERNMENT CONTRACTS.

Western Paving sets dangerous precedent. The district court in *Western Paving* holds that a bidrigger must engage in separate and affirmative acts of concealment beyond participation in the submission of complementary bids[6] and the false swearing of affidavits of noncollusion in order to toll the statute of limitations. *Colorado v. Western Paving Construction Co.*, 630 F. Supp 206, 210 (D. Colo. 1986), *aff'd by an equally divided court*, 841 F.2d 1025 (10th Cir. 1988), *petition for cert. filed*, No. 87-2027 (U.S. June 8, 1988). This holding defies sound logic and public policy and encourages fraudulent conduct by those bidding on government contracts.

Acts such as the submission of complementary bids or false non-collusion affidavits are not essential elements of the underlying cause of action. Such acts,

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[6]A complementary bid is an intentionally high bid "designed to deceive state officials into believing that the project had been bid competitively." *United States v. Young Bros., Inc.*, 726 F.2d 682, 685 (5th Cir. 1984), *cert. denied*, 469 U.S. 881 (1985).

therefore, logically go beyond the conspiracy itself, contrary to the district court's holding in *Western Paving*.[7]

Furthermore, the *Western Paving* decision conflicts with sound public policy by frustrating the competitive sealed bid procedures historically used by governmental purchasers. Competitive bidding statutes are designed to safeguard the integrity of and promote public confidence in government purchasing decisions. By allowing a state to gain the benefits of a competitive marketplace, such statutes save tax dollars. The competitive sealed bid format is widely accepted as being the fairest, simplest, and most efficient method to extend the benefits of the competitive marketplace to the government procurement process. The district court's holding in *Western Paving* undercuts the reliability of the competitive sealed bid system, making it impossible for government purchasers to rely upon the appearance of competition from sealed bids and sworn affidavits of noncollusion as evidence of the bidders' good faith. Instead, government purchasers will have to proceed "from the outset as if [they] were dealing with thieves."[8]

Finally, the stringent tolling standard set forth in *Western Paving* will encourage potential conspirators to break the law by making it less likely that they will suffer adverse consequences if caught. Instead of

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[7]The substantive wrong which constitutes a violation of the Sherman Act in the bidrigging context is the agreement between two or more competitors to allocate a bid contract. Once competitors designate by agreement who will submit the lowest bid, the violation of Section One of the Sherman Act is complete. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982).

[8]*Hudak v. Economic Research Analysts*, 499 F.2d 996, 1002 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

deterring fraud, the *Western Paving* decision rewards the conspirators for successfully concealing their wrongdoing.

The public policy implications of the *Western Paving* decision are staggering. In the face of increased public concern over rising taxes; huge government deficits; and fraud, waste, bribery and collusion affecting all levels of government, this Court should not allow a decision to stand which places government purchasers under the generally impossible burden of proving that a bidrigger undertook affirmative acts, beyond the submission of complementary bids and false noncollusion affidavits, to cover up a conspirary which by its very nature is already concealed.

II. *WESTERN PAVING* IRRECONCILABLY CONFLICTS WITH UNITED STATES SUPREME COURT AND CIRCUIT COURT PRECEDENT, FRUSTRATING A KEY PURPOSE OF STATUTES OF LIMITATION AND THE DOCTRINE OF FRAUDULENT CONCEALMENT.

The doctrine of fraudulent concealment is an offspring of the doctrine of undiscovered fraud. The doctrine of undiscovered fraud provides "that when the object of a suit is to obtain relief against a fraud, the bar of the statute [of limitations] does not commence to run until the fraud is discovered or becomes known to the party injured by it." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347 (1874).

The doctrine of fraudulent concealment, a well-recognized, long-standing, equitable exception to statutes of limitation, is read into every federal statute of limitation. *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L. Ed. 743 (1946). In order

to invoke the doctrine and toll limitations, an antitrust plaintiff must plead and prove the following elements:

> (1) defendant concealed the conduct which forms the basis of the cause of action;
>
> (2) because of defendant's concealment, the plaintiff failed to discover its cause of action within the limitations period; and,
>
> (3) plaintiff was duly diligent in attempting to discover the facts which form the basis of its cause of action.

New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988) *petition for cert. filed,* No. 88-21 (U.S. July 2, 1988); *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 55 (lst Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-250 (9th Cir. 1978); *Charlotte Telecasters. Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976).

A. This Court Should Resolve The Lower Courts' Conflicting Applications Of The Doctrine Of Fraudulent Concealment.

At the appellate and district court levels, case law on the doctrine of fraudulent concealment in antitrust cases is inconsistent, confusing, and vague. Federal courts have applied three conflicting standards to satisfy the concealment element of the fraudulent concealment doctrine: (1) the self-

concealing conspiracy standard;[9] (2) the affirmative acts standard;[10] and (3) the affirmative acts, separate and apart, standard.[11] Further confusion results because rarely, if ever, will a self-concealing antitrust conspiracy fail to involve affirmative acts. The critical distinction under case law, therefore, lies in whether the acts of concealment are separate and apart from the underlying cause of action.

Western Paving held that a plaintiff attempting to invoke the doctrine of fraudulent concealment must prove that the defendant took affirmative steps, separate and apart from the underlying conspiracy, to meet the concealment element of the doctrine. 630 F. Supp. at 210. In so holding, the district court in *Western Paving* misconstrued *King & King Enterprises*

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[9]*E.g., New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988) *petition for cert. filed*, No. 88-21 (U.S. July 2, 1988); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155-56 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978); *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. 271, 274-275 (E.D. Pa. 1986); *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422 (N.D. Ohio 1984).

[10]*E.g., Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988); *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1302 (9th Cir.), *cert. denied*, ___U.S. ___, 107 S. Ct. 279 (1986); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (lst Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 461 (2d Cir. 1974); *Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788, 792 (7th Cir. 1964); *In re Fertilizer Antitrust Litigation*, 1979-2 Trade Cas. (CCH) para. 62,894 (E.D. Wash. 1979).

[11]*E.g., Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885, 888 (M.D. Pa. 1985); *Texas v. Allan Construction Co.*, No. A-85-CA-637 (W.D. Tex. 1987) (unpublished) *appeal pending*, No. 87-1766 (5th Cir.).

v. Champlin Petroleum Co., 657 F.2d 1147, 1154 (10th Cir. 1981), controlling legal precedent.[12] Further, *Western Paving* clearly conflicts with substantial case law from numerous jurisdictions, including a recent decision from the Second Circuit Court of Appeals:

> [A] plaintiff may prove the concealment element *by showing either* that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing.

New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988), *petition for cert. filed,* No. 88-21 (U.S. July 2, 1988) (emphasis added).

With three incompatible standards being applied, conflicts exist in abundance.[13] Colorado's Petition for Certiorari should be granted.

B. *Western Paving* Cannot Be Reconciled With *Bailey v. Glover* And Other Supreme Court Precedent Because Bidrigging Conspiracies Are Inherently Self-Concealing And Equivalent To Fraud.

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[12]*Western Paving* did not overrule or in any way modify the holding in *King*, because the *Western Paving en banc* decision, which affirmed the district court by an equally divided court, has no precedential value. *Loeffler v. Tisch*, 806 F.2d 817, 818 (8th Cir. 1986), *rev'd on other grounds*, ___ U.S. ___, 108 S.Ct. 1965 (1988) (award of prejudgment interest in civil suit against United States Postal Service) ; *Nagy v. United States Postal Service*, 773 F.2d 1190, 1192-93 n.2 (llth Cir. 1985).

[13]Such conflicts are discussed in detail in the Petition for Certiorari filed herein by the State of Colorado.

The *Western Paving* district court held that the first element of the fraudulent concealment doctrine can be satisfied only by proving that the defendant took "affirmative steps in addition to the original wrongdoing to prevent the plaintiff from discovering the wrong." 630 F. Supp. at 210.[14] *Western Paving* directly conflicts with *Bailey v. Glover* and cannot be reconciled with either its holding or rationale.

The issue before the Court in *Bailey* was whether in actions at law, plaintiff's ignorance of defendant's fraudulent conduct had to result from the defendant's affirmative acts of concealment. 88 U.S. at 347-348. The *Bailey* court held that a plaintiff need not prove affirmative acts of concealment where the cause of action "is of such character as to conceal itself." *Id.* at 349-350. The holding in *Bailey* was based upon legal precedent and a "sound and philosophical view of the principles of the statutes of limitations."

> [Statutes of limitation] were enacted to prevent frauds. . . . To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Id. at 349.

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[14]The court did not discuss the second element, plaintiff's lack of knowledge, or the third element, due diligence, because it found that the plaintiff failed to prove affirmative acts, separate and apart from the conspiracy itself. 630 F. Supp. at 211 n.5.

A line of cases following *Bailey v. Glover* affirmed the holding that in actions based upon fraud it is not necessary to show affirmative acts of concealment, because fraud, by its very nature, is self-concealing. *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed 743 (1946); *Exploration Co. v. United States*, 247 U.S. 435, 38 S. Ct. 571, 62 L. Ed. 1200 (1918). "[C]oncealment is established by the nature of the act. . . ." *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). On the other hand, the fraudulent concealment doctrine will toll the limitations period when fraud does not serve as the basis of plaintiff's cause of action only if the defendant has taken affirmative acts for the sole purpose of covering up the actionable wrong. Dawson, *Fraudulent Concealment and Statutes of Limitations*, 31 Mich. L. Rev. 875, 880-882 (1933) (footnote omitted) (*cited with approval in Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1469 (6th Cir. 1988)).[15] The distinction is drawn because concealment is not inherent in causes of action other than fraud. In other words, before a court may apply the doctrine of fraudulent concealment, it must find fraud; if the fraud cannot be found in the original wrong committed by a defendant, it must be found in a cover up of the wrongdoing, i.e., an affirmative act of concealment, before the statute of limitations will be tolled.

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[15]*Pinney Dock & Transport Co. v. Penn Central Corp.*, a recent decision from the Sixth Circuit, illustrates this distinction. There the Sixth Circuit held that in antitrust cases *not* founded on fraud, the plaintiff must show an affirmative act in order to invoke the doctrine of fraudulent concealment; the court did not, however, state that the acts must be separate and apart from the wrongdoing itself. 838 F.2d at 1465. Furthermore, the Sixth Circuit recognized by implication that the statute may be tolled without the necessity of proving affirmative acts of concealment when the wrong itself is fraudulent and, thus, self-concealing. *Id.*

In failing to follow this Court's holding in *Bailey*, the Colorado district court in *Western Paving* ignores the fraudulent nature of bidrigging and, as a result, draws an untenable distinction between antitrust fraud cases and other types of fraud cases. There is, however, no rational basis for drawing such a distinction. Fraud is fraud, and the same rationale that this Court has relied upon over the years in applying the equitable doctrine of undiscovered fraud applies with equal force to the self-concealing conspiracy of bidrigging.

By its very nature, the *per se* violation of bidrigging (especially when the bidrigging involves complementary bidding) virtually always involves secret agreements and covert meetings; the success of the conspiracy depends upon such concealment. As the Second Circuit recently stated in *New York v. Hendrickson Bros.*:

> The passing off of a sham article as one that is genuine is an inherently self-concealing fraud, whether what is passed off is a fake vase sold as a real antique, or a collusive bid purporting to reflect genuine competition. . . . [A] bid-rigging conspiracy is the kind of enterprise that requires a number of participants and, in order that there be adequate incentive for their participation, agreement as to a number of contracts. Thus, the enterprise is designed to endure over a period of time. In order to endure, it must remain concealed from the victim of the collusive bids.

840 F.2d. at 1083-1084 (citations omitted). Need for concealment is further heightened because of the criminal sanctions and civil liabilities which might result if such actions are discovered. Thus, bidrigging

conspiracies have been recognized as self-concealing and fraudulent. *New York v. Hendrickson Bros.*, 840 F.2d at 1083-84; see also *Greenhaw v. Lubbock County Beverage Association*, 721 F.2d 1019, 1030 (5th Cir. 1983); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1314 (5th Cir. 1983); *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422, 429 (N.D. Ohio 1984).

Although there are undoubtedly occasions when antitrust laws may be violated without fraudulent conduct, "there may also be circumstances where fraud is an ingredient of the anticompetitive scheme." *United States v. Azzarelli Construction Co.*, 612 F.2d 292, 298 (7th Cir. 1979). The Seventh Circuit further stated in *Azzarelli* that when defendants collude to defeat a competitive bidding statute "prescribed in the public interest. . .in order to obtain for taxpayers the lowest possible costs for public works being undertaken" their conduct "plainly manifest[s] a species of fraud or false representation." *Id.* The *Azzarelli* court noted that "this is particularly true where, as here, bidders were required by law to sign (and did sign) statements that no collusion had been practiced." *Id.* Under such circumstances, the plaintiff's conduct is fraudulent. *Id. See also, United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988); *United States v. Walker*, 653 F.2d 1343, 1346-47 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

The wrongdoing in the *Western Paving* case was, as in *Bailey*, *Azzarelli* and *Henrickson Bros.*, clearly self-concealing and fraudulent. No further concealment need be shown for tolling purposes.

CONCLUSION AND PRAYER

For the foregoing reasons, the State of Colorado's Petition for Certiorari should be granted.

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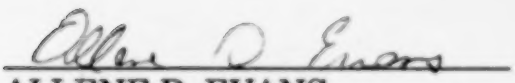

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